

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

MACJHAY YAGAO,

**Plaintiff,**

CASE NO. 15cv2554-WOH-JLB

## ORDER

JOHN WEAVER, Warden,

## Defendant.

HAYES, Judge:

15 On November 1, 2015, Petitioner Macjhay Yagao commenced this action by  
16 filing a Petition for Writ of Habeas Corpus. (ECF No. 1). On December 17, 2015,  
17 Petitioner filed an Amended Petition for Writ of Habeas Corpus challenging his San  
18 Diego Superior Court conviction for the transportation of more than 28.5 grams of  
19 marijuana in violation of California Health and Safety Code section 11360(c). (ECF  
20 No. 6). On December 9, 2016, Petitioner filed a motion for stay and abeyance. (ECF  
21 No. 34).

22 On July 7, 2017, the United States Magistrate Judge issued a Report and  
23 Recommendation recommending this Court deny the Amended Petition and the motion  
24 for stay and abeyance. (ECF No. 37). On July 28, 2017, Petitioner filed objections to  
25 the Report and Recommendation. (ECF No. 38).

26 On August 29, 2017, the Court adopted the Report and Recommendation in its  
27 entirety, denied the Amended Petition, denied the motion for stay and abeyance, and

1 granted a certificate of appealability.<sup>1</sup> (ECF No. 39). A Clerk’s Judgment was issued.  
2 (ECF No. 40).

3 On September 25, 2017, the Petitioner filed a document in the United States  
4 Court of Appeals for the Ninth Circuit which included a notice of appeal, a motion for  
5 pro bono counsel, and a motion to proceed in forma pauperis. (ECF No. 41).

6 Parties filing appeals to the United States Court of Appeals for the Ninth Circuit  
7 are required to pay a filing fee. *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir.  
8 1999). An action may proceed despite a party’s failure to pay only if the party is  
9 granted leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a). *Id.* “To  
10 proceed in forma pauperis is a privilege not a right.” *Smart v. Heinze*, 347 F.2d 114,  
11 116 (9th Cir. 1965). Pursuant to Federal Rule of Appellate Procedure 24, “a party to  
12 a district court action who wishes to appeal in forma pauperis must file a motion in the  
13 district court.” Fed. R. App. P. 24(a)(1). “The party must attach an affidavit that ...  
14 shows in the detail prescribed by Form 4 of the Appendix of Forms the party’s inability  
15 to pay or to give security for fees and costs....” Fed. R. App. P. 24(a)(1)(A). Federal  
16 Rule of Appellate Procedure 24 further provides:

17 A party who was permitted to proceed in forma pauperis in the district-  
18 court action . . . may proceed on appeal in forma pauperis without further  
19 authorization . . . unless (A) the district court . . . certifies that the appeal  
20 is not taken in good faith or finds that the party is not otherwise entitled  
21 to proceed in forma pauperis and states in writing its reasons for the  
22 certification or finding; or (B) a statute provides otherwise.

23 Fed. R. App. P. 24(a)(3).<sup>2</sup> “An appeal may not be taken in forma pauperis if the trial  
24 court certifies in writing that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3). In  
25 the Ninth Circuit, “good faith” means that “at least one issue or claim is found to be  
26 non-frivolous.” *Hooker v. Am. Airlines*, 302 F.3d 1091, 1092 (9th Cir. 2002). An

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27 <sup>1</sup> On October 4, 2017, the Court of Appeals remanded this case to this Court for  
28 the limited purpose of issuing a modified certificate of appealability which specifies  
which issues satisfy the standards set forth in 28 U.S.C. § 2253(c).

27 <sup>2</sup> Petitioner was not permitted to proceed in forma pauperis in the district court.  
28 This Court denied a motion to proceed in forma pauperis (ECF No. 5) and the action  
proceeded in district court only after Petitioner paid the applicable filing fee. (ECF No.  
7).

1 action is “frivolous” for purposes of section 1915 if it lacks any arguable basis in law  
2 or fact. *Neitzke v. Williams*, 490 U.S. 319, 325, 327 (1989); *Franklin v. Murphy*, 745  
3 F.2d 1221, 1225 (9th Cir. 1984).

4 In support of his motion to proceed in forma pauperis, Petitioner asserts only the  
5 following: “Petitioner also moves the Court to proceed in forma pauperis because he  
6 is an indigent detainee and unable to pay for the Court’s fees.” (ECF No. 41 at 1).  
7 Petitioner has not provided the Court with any financial information in connection with  
8 this motion and has not attached in affidavit which “shows in the detail prescribed by  
9 Form 4 of the Appendix of Forms the party’s inability to pay or give security for fees  
10 and costs” as required by Federal Rule of Appellate Procedure 24(a). Petitioner has  
11 failed to provide the Court with any information upon which it can conclude that  
12 Petitioner is unable to afford the costs of these proceedings.

13 IT IS HEREBY ORDERED that the motion to proceed in forma pauperis on  
14 appeal is DENIED. (ECF No. 42) .

15 DATED: October 18, 2017

16   
17 WILLIAM Q. HAYES  
18 United States District Judge

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